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RECENT CASES

BLASTING—INJURY—NEGLIGENCE—PATRICK ET UX. V. SMITH ET AL., 134 PAC., 1076, (WASH.)—*Held*, where defendants, while engaged in work on a right of way, exploded a charge of powder which loosened earth and by vibration alone destroyed plaintiff's well, located about 500 feet from the point of the explosion, plaintiff was entitled to recover without proof of negligence.

It is conceded to be the rule that when one in blasting on his premises casts earth or rock on the land of another he is liable for the invasion, although the work was done without negligence, *St. Peter v. Denison*, 58 N. Y., 416; *G. B. & L. R. R. Co. v. Eagles*, 9 Colo., 544; *McAndrews v. Collierd*, 42 N. J. L., 189; *Munro v. Dredging Co.*, 84 Cal., 515, proceeding on the theory that it is better that one should be deprived of the use of his land in a particular way than that another lose the use of his altogether, which is an unremote possibility. *Hay v. Cohoes Co.*, 2 N. Y., 159, a leading case; *Scott v. Bay*, 3 Md., 431. The basis of recovery is the maxim, "*sic utere tuo ut alienum non laedas*." *Tiffin v. McCormack*, 34 Ohio St., 638. When, however, there is no physical invasion of the premises in question and the damage is found to result only from the vibration of the air or earth, the weight of authority is contrary to the principal case, and holds that negligence must be shown or it is *damnum absque injuria*, *Booth v. Rome W. & T. R. R.*, 140 N. Y., 267; *Murphy v. City of Lowell*, 128 Mass., 396; *Benner v. Atlantic Dredging Co.*, 134 N. Y., 156, Vann, J., *dissenting*, unless possibly the blasting is *per se* a nuisance, *Simon v. Henry*, 65 N. J. L., 486, *semble*. These holdings are based on the idea that the maxim "*sic utere tuo*, etc." can only apply when a legal right has been invaded, *Newell v. Woolfolk*, 91 Hun. (N. Y.), 211, and especially is this doctrine advanced if the damage is inevitable. *French v. Vix et al.*, 143 N. Y., 90. So one blasting in a mine cannot be held liable for surface injuries, in the absence of negligence, if the land in its natural state be not disturbed. *Marvin v. Mining Co.*, 55 N. Y., 538. Other jurisdictions, nevertheless, make no distinction as regards proof of negligence, between physical invasion and vibration so be it that the damage occurs. *Colton v. Onderdonk*, 69 Cal., 155; *Farrandis v. R. R.*, 41 Wash., 486; *Gosset v. So. R. Co.*, 115 Tenn., 378. These courts refuse to regard damage from the jarring of earth as *damnum absque injuria*, *Smith v. St. Paul R. R.*, 41 Wash., 355, either on the basis that work is being done which is intrinsically dangerous and the natural consequences, whether resulting in physical invasion of another's premises or damage to them by vibration, are acts which are the subject of recovery, *Fitzsimmons v. Braun*, 199 Ill., 397, or that the force used constitutes the injury, the invasion being immaterial. *Hickey v. McCable & Bihler*, 30 R. I., 346 (1910). Others reach the same conclusion by assuming that blasting, in cities at least, is a *prima facie* nuisance, relieving the plaintiff from proof of negligence, if damage result. *Glycerine Co. v. St. Mary's Co.*, 64 Ohio St., 560; *Tiffin v. McCormack*, *supra*. The rule of the case under discussion is in harmony with the

noted case of *Fletcher v. Rylands*, L. R. 3 H. L., 330, would seem to work substantial justice, and be the better on principle if not on authority. Each case would thus be considered on its own merits without the restraint of technical rules of trespass, which casts the burden on the plaintiff of proving negligence.

CARRIERS—ACTION BY STREET CAR PASSENGER—EVIDENCE ADMISSIBLE UNDER GENERAL ISSUE.—*BINDER ET AL. V. GEORGIA RY & EL. CO.*, 79 S. E. 216 (Ga.).—*Held*, that where a suit is brought against a street railway company to recover damages for the failure to perform its duty by protecting a passenger from the wrongful act of its motorman, the defendant, under the plea of the general issue, can introduce evidence showing that the act and conduct of its servant was fully warranted and justifiable.

The general rule is that a carrier of passengers is not an insurer of their safety. *Gardner v. N. J. Tract. Co.*, 58 N. J. L., 176; *McPadden v. N. Y. C. R. Co.*, 44 N. Y., 478. But such a carrier is bound to use the highest degree of care, skill, and diligence, that is possible under the circumstances, to protect its passengers from injury. *Louisville R. R. Co. v. Wellington*, 137 Ky., 719; *Penn. R. R. Co. v. Ray*, 102 U. S., 451. Courts taking this view impose on the carrier an absolute liability for the torts of its servants. *McMahon v. Chicago City R. Co.*, 239 Ill., 334; *Horgan v. Boston El. R. Co.*, 208 Mass., 287. Hence, it has been held that abusive or insulting language on the part of the passenger will not justify an assault by the carrier's employee, so as to relieve the carrier from liability for damages resulting from the assault. *B'ham R. Light. & Power Co. v. Mullen*, 138 Ala., 614; *Hanson v. Urbana & C. El. Co.*, 75 Ill. App., 474; *Neuer v. Metr. Str. R. Co.*, 143 Mo., 402. But other cases hold that abusive language by a passenger toward the carrier's employee may relieve the carrier from liability for an assault on the passenger. *Wise v. R. R. Co.*, 17 Ky. L. Rep., 1359; *Peavy v. R. R. Co.*, 81 Ga., 485. But the courts taking this view put their decisions on the ground that the passenger is guilty of contributory negligence in unfitting the employee, by such insults, from properly observing his duty, rather than that the insulting language justifies the assault. *Rohrback v. Pull. Pal. Car Co.*, 166 Fed., 797; *R. R. Co. v. Shropshire*, 101 Ga., 33. Courts which do not recognize abusive language as a complete defence for an assault by the carrier's employee, nevertheless allow such conduct as an element in mitigation of damages. *B. & O. R. Co. v. Barger*, 80 Md., 23; *Freedman v. Metr. Str. R. Co.*, 89 App. Div. (N. Y.), 486. But if there had been time for cool reflection after the insults, or if the insulting words were themselves provoked by similar words of the employee the principle of mitigation is held not to apply. *R. R. Co. v. Batchler*, 37 Tex. Civ. App., 116. And, where the conduct of the passenger is not allowed to mitigate the damages, it is allowed to be shown as a defence to the recovery of exemplary damages. *R. R. Co. v. Myzell*, 87 Ark., 123; *Mitchell v. R. R. Co.*, 125 Mo. App., 1. But the fact that a man is a servant of a carrier does not deprive him of the right of self-defence, and so it is generally held that damages in respect of an assault committed by the carrier's servant for the purpose